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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/916,101	07/25/2001	Arthur S. Harkin	10006843-1	8431

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EXAMINER

SWEARINGEN, JEFFREY R

ART UNIT	PAPER NUMBER
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2145

DATE MAILED: 03/10/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/916,101

Applicant(s)

HARKIN ET AL.

Examiner

Jeffrey R. Swearingen

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-12 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-12 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 02 February 2005 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. ____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date ____.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. ____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: ____.

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DETAILED ACTION

1. This action is in response to communications received on 2/2/2005. This action is made **FINAL**.

Drawings

2. The drawings were received on 2/2/2005. These drawings are acceptable for examination.

Specification

3. The substitute specification received on 2/2/2005 has been entered into the record.

Claim Rejections - 35 USC § 102

4. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

5. **Claims 1-4, 8-9, 11-12** rejected under 35 U.S.C. 102(b) as being anticipated by Phaal (U.S. Patent No. 6,055,564).

6. Regarding **claim 1**, Phaal discloses *an application tier that generates resource utilization data; and a client-response tier that performs admission control using said resource utilization data* [Phaal

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discloses a resource monitor, an admission control gateway, and processing servers. Because the resource monitor and admission control gateway operate independently of each other, Examiner considers them to be in different tiers. See Phaal, Figure 2. See Phaal, column 5, lines 60-62. See Phaal, column 6, lines 13-15.]. By this rationale **claim 1** is rejected.

7. Regarding **claim 2**, Phaal discloses a *client-response tier ha[ving] an admissions control gateway for receiving client requests from client computers* [See Phaal, Figure 2, item 125.]; a *deferral manager for making determinations concerning which of said client requests should be admitted for processing at least in part as a function of application-resource-utilization data* [See Phaal, Figure 2, item 131.]; a *client-request processor for processing, said client-request processor generating application requests in response to at least some of said client requests, said client-request processor generating client responses received in response to said application requests* [See Phaal, Figure 2, item 117.]; and *said application tier ha[ving] at least one application-tier server not in said client-response tier, an application processing function running on said server for responding to said application requests with said application responses* [Phaal discloses a scheduler, which would respond to requests from the deferral manager with responses. See Phaal, Figure 2, item 135.], and a *resource monitor for generating said application-resource-utilization data by monitoring utilization parameters on said server, said resource monitor communicating said resource-utilization to said deferral manager* [Phaal's resource monitor does not communicate directly with the deferral manager. However, Phaal's resource monitor does use the information from the resource manager to decide whether to admit the request in the admission control gateway, as per the preferred embodiment of the invention. This performs equivalent functionality to the deferral manager receiving information from the resource monitor, per the specification. See Phaal, column 6, lines 24-49.]. By this rationale **claim 2** is rejected.

8. Regarding **claim 3**, Phaal discloses the use of the invention in a web environment. See Phaal, column 7, lines 16-65. Phaal gives examples of the messages passed in the web environment, including HTTP. See Phaal, column 1, lines 18-27. By this rationale **claim 3** is rejected.

9. Regarding **claim 4**, Phaal discloses a *client-response tier includ[ing] at least one client-response-tier server on which said deferral manager and said client-request processor run, said client-response-tier*

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also having a client-response-tier resource monitor for generating client-response-tier resource utilization data as a function of parameters associated with said client-response-tier server, said client-response-tier resource monitor providing said client-response-tier resource utilization data to said deferral manager, said deferral manager making said determinations in part as a function of said client-response-tier resource utilization data. [Phaal discloses a preferred host processing system with a deferral manager and a resource monitor. See Phaal, column 5, lines 40-44. See Phaal, column 6, lines 13-65. Phaal's resource monitor does not communicate directly with the deferral manager. However, Phaal's resource monitor does use the information from the resource manager to decide whether to admit the request in the admission control gateway, as per the preferred embodiment of the invention. This performs equivalent functionality to the deferral manager receiving information from the resource monitor, per the specification. See Phaal, column 6, lines 24-49. Phaal states that one or more servers are present in the host system. See Phaal, column 5, lines 43-45. Phaal does not limit where the resource monitor and deferral manager can be located in the system, so the resource monitor and deferral manager can be located on a server.] By this rationale **claim 4** is rejected.

10. Regarding **claim 8**, the limitations of this claim are substantially the same as those in claim 2. Therefore the same rationale for rejecting claim 2 is used to reject claim 8. By this rationale **claim 8** is rejected.

11. Regarding **claim 9**, Phaal discloses *in the event a determination is made to defer admission of said client request, a notification is sent to said client to that effect via said network* [Phaal generates a web page sent to client's browser, informing the client that the request is deferred. See Phaal, column 7, lines 27-36.]. By this rationale **claim 9** is rejected.

12. Regarding **claim 11**, the limitations of this claim are substantially the same as those in claim 4. Therefore the same rationale for rejecting claim 4 is used to reject claim 11. By this rationale **claim 11** is rejected.

13. Regarding **claim 12**, the limitations of this claim are substantially the same as those in claim 1. Therefore the same rationale for rejecting claim 1 is used to reject claim 12. By this rationale **claim 12** is rejected.

Claim Rejections - 35 USC § 103

14. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

15. **Claims 5-7, 10** rejected under 35 U.S.C. 103(a) as being unpatentable over Phaal and Bixby et al. (U.S. Patent No. 5,317,568).

16. Pertaining to **claim 5**, Phaal is applied as in claim 4. Phaal fails to disclose expanding the processing capacity on the client-response tier.

17. However, Bixby discloses expanding the processing capacity. [Bixby discloses the use of load distribution among information processors. Each record can be adjusted to reconfigure the distribution of processing load among processors. See Bixby, column 4, lines 17-46].

18. It would have been obvious to one of ordinary skill in the networking art at the time of the invention to combine Phaal and Bixby for the purpose of resource management [See Bixby, column 2, lines 55-57]. Phaal gives motivation for the combination by stating that as long as processing resources are available messages are processed. [See Phaal, column 1, lines 61-65]. By this rationale **claim 5** is rejected.

19. Pertaining to **claim 6**, Phaal is applied as in claim 2. Phaal fails to disclose expanding the processing capacity on the application tier.

20. However, Bixby discloses expanding the processing capacity. [Bixby discloses the use of load distribution among information processors. Each record can be adjusted to reconfigure the distribution of processing load among processors. See Bixby, column 4, lines 17-46]. By this rationale **claim 6** is rejected.

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21. Pertaining to **claim 7**, Phaal and Bixby are applied as in claim 6. Bixby also discloses increasing the number of processors to increase processing capacity. [Examiner considers reconfiguring the distribution of processing load among processors to allow increasing the number of processors. See Bixby, column 4, lines 17-46]. By this rationale **claim 7** is rejected.

22. Pertaining to **claim 10**, the limitations of this claim are substantially the same as those in claim 6. Therefore the rationale used to reject claim 6 is used to reject claim 10. By this rationale **claim 10** is rejected.

Response to Arguments

23. Applicant's arguments filed 2/2/2005 have been fully considered but they are not persuasive.

24. In response to Applicant's argument that the references fail to show certain features of Applicant's invention, it is noted that the features upon which Applicant relies (i.e., "The host site has distinct client-response and application tiers in that each host-site server is assigned to at most one of the tiers.") are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

25. Applicant's reading of the Phaal reference assumes that the Phaal invention is embodied in a single server. In fact the Phaal invention is not limited to a single server. Phaal discloses a host processing system as the preferred embodiment. See Phaal, column 4, line 12. Phaal also gives indication that the host processing system consists of more than one server. See Phaal, column 6, lines 13-23, where Phaal talks about how different servers in the host processing system can respond differently to a query of server resource availability.

26. Even further, if the Phaal reference were limited to a single server, it would be easy for one of ordinary skill in the art to separate the functions implemented on that single server and put those separated functions on separate servers to fulfill Applicant's controlling definition of tier. Many terms exist for separating out functions on a server and having them operate on multiple servers. For example, load balancing, server clusters, distributed systems, dedicated servers, specialized servers, enterprise deployment, parallel servers, content distribution networks.

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27. Applicant argues that Phaal does not teach that resource utilization data is generated on an application server that does not otherwise perform admissions control. Referring to the claimed subject matter, Applicant has not claimed that resource utilization data is generated on an application server that does not otherwise perform admission control. Applicant has claimed a resource monitor that generates resource utilization data. Applicant has also claimed an admissions control gateway. Applicant has claimed at least one application-tier server is not in the client-response tier. Applicant has not claimed that resource utilization data is generated on an application server that does not otherwise perform admissions control. Applicant has stated that the resource monitor generates the resource utilization data, but has not given the limitation that no admissions control can be performed on the resource monitor. Applicant claims at least one application-tier server is not in said client response tier. Applicant has not claimed that all application-tier servers should not be in the client response tier or should not have any functionality of the client-response tier.

28. Applicant's description of the tiers as claimed in claim 1 is vague and nebulous. This vague, nebulous language is present in all submitted claims. The Examiner appreciates that Applicant would like to receive the broadest claim coverage possible. However, the Examiner does not believe that the claims currently presented specifically define what is Applicant's exact invention.

Conclusion

29. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.


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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jeffrey R. Swearingen whose telephone number is (571) 272-3921. The examiner can normally be reached on M-F 8:30-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Valencia Martin-Wallace can be reached on 571-272-6159. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

JRS


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